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Criminal Procedure—"Presumption of Concurrence" of Sentences Strictly Limited

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statute is not necessary under the *Alvich* case, the Court was there considering the method of obtaining the psychiatric report; whereas, here it was not the method that was challenged, but the failure to obtain it at the essential time.

The Court is not restricting the decision in the *Alvich* case but taking that rule as broadly stated there and further defining it. The examination is irrelevant to the conviction but is required to aid the judge in exercising his discretion as to whether to impose a determinate or indeterminate sentence. The requirement is, therefore, that the report submitted to the judge be current according to this statutory purpose. The examination given aften the indictment is mainly for the purpose of determining whether the defendant is sane and capable of understanding the charges against him. As such it is hardly sufficient for the purpose of sentencing. The manner and method of obtaining the report may be satisfied by substantial compliance with the statute, but there may be no deviation from the rule that the report be current.

Bd.

"PRESUMPTION OF CONCURRENCE" OF SENTENCES STRICTLY LIMITED

When a defendant in a criminal proceeding is convicted of more than one offense, the trial court has the discretionary power to impose cumulative rather than concurrent sentences.[30] Some courts have held that where the trial judge failed to specifically exercise his discretion and failed to state that the sentences imposed were consecutive, a presumption arose that the terms were to be concurrent.[31] These decisions were based upon an extension of the Court of Appeals' holding in *People v. Ingber*.[32] In that case, however, the Court only stated that when a defendant sentenced at the same time for two or more offenses had been tried at the same term of court before the same judge, and where the judge omitted through inadvertence to make the terms successive, there was a presumption that the terms were meant to be concurrent.[33]

In *Browne v. New York State Board of Parole*,[34] the Court of Appeals construed *Ingber* strictly, reversing both the Appellate Division[35] and Special Term[36] decisions based on the broader interpretations of that opinion. Petitioner, who was on probation following sentencing as a youthful offender for the misdemeanor of attempted extortion, was subsequently convicted of attempted sodomy, first degree robbery, first degree grand larceny and second and third degree assault. He was sentenced to an indefinite term on each count, the sentences to run concurrently and not consecutively, but no reference was made to his prior sentence for the misdemeanor which was still outstanding.

30. N.Y. Penal Law § 2190; People v. Ingber, 248 N.Y. 302, 162 N.E. 87 (1928).
31. E.g., People ex rel. Winelander v. Denno, 9 A.D.2d 898, 195 N.Y.S.2d 165 (2d Dep't 1959); People ex rel. Gerbino v. Ashworth, 267 App. Div. 579, 47 N.Y.S.2d 551 (1st Dep't 1944).
32. Supra note 30.
33. Id. at 305, 162 N.E. at 88.
34. 10 N.Y.2d 116, 218 N.Y.S.2d 33 (1961).
35. 25 Misc. 2d 1050, 207 N.Y.S.2d 488 (Sup. Ct. 1960).
36. —A.D.2d—, 211 N.Y.S.2d 1014 (2d Dep't 1961).

The Board of Parole computed the maximum expiration date of petitioner's term by treating the two sentences as running consecutively. Thereupon, petitioner brought an Article 78 proceeding relying upon the "presumption of concurrence." The Court of Appeals held that the presumption was not applicable to sentences imposed at different times, in different courts and for completely unrelated crimes.[37]

The Court also stated that an Article 78 proceeding was the proper remedy rather than habeas corpus, inasmuch as petitioner did not seek review of a discretionary act of the Board, but rather, maintained that the Board's action was erroneous as a matter of law.[38]

Bd.

RIGHT OF APPEAL AS POOR PERSON LIMITED BY COURT'S DETERMINATION OF CAUSE

The Code of Criminal Procedure grants to all defendants in a criminal prosecution the right of appeal.[39] To prevent this right of appeal from being an empty right, the Rules of Civil Practice, Rule 35, enable a defendant to appeal as a poor person and thereby obtain a copy of the transcript of all prior proceedings at the expense of the State. The relator, in *People ex rel. Baumgart v. Martin*,[40] attempted to appeal as a poor person from the dismissal of a writ of habeas corpus.

The relator, convicted of murder in the second degree, applied for a writ of habeas corpus challenging the jurisdiction of the court to find a verdict on the ground that only eleven jurors had answered the polling of the jury. At the hearing it was found that this was only a stenographic error in the record and the writ was denied; whereupon, relator filed a notice of appeal. Relator, in the meantime, prosecuted an appeal from the original judgment of conviction based upon the same grounds as the writ. The original judgment was affirmed in both the Appellate Division[41] and the Court of Appeals,[42] and certiorari was subsequently denied by the United States Supreme Court.[43] Respondent then made a motion in the Appellate Division to dismiss the dormant appeal from the denial of the writ of habeas corpus, and at the same time relator made a cross motion for leave to appeal as a poor person. The Appellate Division denied relator's motion for permission to appeal as a poor person and granted respondent's motion for dismissal for failure to file and serve the printed papers on appeal as required by Rule 234 of the Rules of Civil Practice.

The determination of this case hinged upon the fundamental question of

37. The Court noted that it had already rejected the contention that a presumption of concurrence was applicable in the case of two unrelated crimes. See, People on Petition of Aronstein ex rel. Mello v. Warden, 1 A.D.2d 977, 150 N.Y.S.2d 915 (2d Dep't 1956).
38. Cf. Hines v. State Board of Parole, 293 N.Y. 254, 56 N.E.2d 572 (1944).
39. N.Y. Code Crim. Proc. § 517.
40. 9 N.Y.2d 351, 214 N.Y.S.2d 370 (1961).
41. 6 A.D.2d 854, 175 N.Y.S.2d 1010 (4th Dep't 1958).
42. 5 N.Y.2d 874, 182 N.Y.S.2d 24 (1959).
43. 359 U.S. 994 (1959).